

Appeal from decision of Wyoming State Office, Bureau of Land Management, denying protest against issuance of noncompetitive oil and gas lease W-79053.

Set aside and hearing ordered.

1. Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents -- Oil and Gas Leases: Applications: Filing

Under 43 CFR 3102.2-1 (1981), a simultaneous oil and gas lease applicant could have filed for reference the statement of qualifications of his agent required by 43 CFR 3102.2-6 (1981) in any Bureau of Land Management state office. Upon acceptance of the filing by BLM and assignment of a serial number, the applicant could have properly referenced the serial number on future oil and gas applications filed with any BLM office in lieu of resubmitting the statement.

2. Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents -- Oil and Gas Leases: Applications: Filing

The Board will set aside a BLM decision denying a protest contending that the first-drawn applicant for a noncompetitive oil and gas lease has not complied with 43 CFR 3102.2-6 (1981), requiring the disclosure of any agreement or arrangement with the lease filing service which assisted the applicant and order a hearing, where on appeal the protestant creates considerable doubt that the applicant provided all relevant information.

3. Evidence: Burden of Proof -- Evidence: Presumptions -- Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents -- Oil and Gas Leases: Applications: Filing -- Rules of Practice: Evidence

Where an issue in an appeal involving a simultaneous oil and gas lease application is the existence or nonexistence of materials defining the relationship between the

priority applicant and its filing service, the applicant, as the party with peculiar means of knowledge enabling it to prove the nonexistence of such materials, has the burden of doing so. Failure to do so may give rise to an inference that the applicant's evidence is unfavorable.

4. Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents -- Oil and Gas Leases: Applications: Filing

An agency agreement which was filed for reference pursuant to 43 CFR 3102.2-1(c) (1981), had to be limited in duration to less than 2 years.

APPEARANCES: David A. Gottenborg, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Hal Carlson, Jr., has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated January 20, 1983, denying his protest against the issuance of noncompetitive oil and gas lease W-79053, to Hunter Court Properties (Hunter Court).

Hunter Court's simultaneous oil and gas lease application was drawn with first priority for parcel WY 404 in the January 1982 simultaneous oil and gas lease drawing. Appellant's application was drawn with second priority. On January 20, 1983, the Wyoming State Office dismissed the protest filed by appellant through his 1982 letters of May 19, August 1, October 27, December 17, and December 30. Appellant contended that the signature on the application filed by Hunter Court was in violation of 43 CFR 3112.2-1(b) because the signatory failed to reveal the name of the applicant. 1/ BLM found that the application was in the partnership name with reference made to the partnership qualification file which listed the signatory as the person authorized to sign on behalf of the partnership. Appellant also contended that there was an undisclosed partner in Hunter Court. BLM found that the qualification file disclosed all of the partners and contained the required statements by those partners holding more than 10 percent interest.

Appellant further contended that the Hunter Court partnership did not submit a personally signed filing service agreement. BLM found that Hunter Court complied with 43 CFR 3102.2-6 by including a signed copy of the filing service agreement in the qualification file; 2/ and that Western New York Geological Service, Inc. (Western), the filing service retained by Hunter Court, complied by furnishing a blank copy of the agreement and a list of their clients on January 25, 1982, within 15 days of the filing of the application.

Appellant's final contention was that Hunter Court did not submit all of the agreements it had with the filing service since the agreement between

1/ All references to Departmental regulations are to those which were in effect during the period established for filing applications for oil and gas lease W-79053 (January 1982).

2/ The protest dismissal decision of Jan. 20, 1983, mistakenly refers to this regulation as 43 CFR 3106.2-6.

Hunter Court and the filing service referred to "materials that describe Western New York Geological Services' Federal/State Land Lease Acquisition Program," and Hunter Court submitted only the basic agreement. BLM responded that Ricky L. Gifford, 34 IBLA 160 (1978), allows an applicant 30 days to submit additional material when requested by BLM. BLM then notified appellant that it was requesting Hunter Court to forward to BLM all such materials, noting that at the time the material was received, BLM would be able to determine if the filing service held an interest in Hunter Court's application.

Also, on January 20, 1983, BLM sent Hunter Court the lease offer forms and stipulations and first year's rental request, as well as a request for the "other materials describing Western New York Geological Services' Federal/State Land Lease Acquisition Program" which was referred to in item 3 of the filing service agreement Hunter Court had included in its qualification file on December 29, 1981.

On February 18, 1983, Hunter Court filed with BLM the signed lease offer and stipulations, the rental payment, and copies of certain documents. Also on February 18, 1983, appellant filed his notice of appeal with this Board.

In his statement of reasons for appeal, appellant asserts that Hunter Court failed to submit with its application the documents required by 43 CFR 3102.2-6(a), and it cannot take advantage of the alternative provided by 43 CFR 3102.2-6(b). ^{3/} He also contends that Hunter Court had to submit the signed contract with Western with the application because (1) the alternative disclosure method provided by section 3102.2-1(c) applies only where an agent files on behalf of the applicant, (2) the regulations provide no authority whereby the qualification file of the applicant may contain the information required of the agent, and (3) even if an agency relationship is deemed to exist, no limitation was provided on the duration of the agent's authority to act on behalf of Hunter Court. Appellant further argues that Hunter Court failed to disclose fully its agreement with an entity in the business of providing services relating to Federal oil and gas leasing as required by 43 CFR 3102.2-6.

The applicable regulations relating to partnerships and agents are found at 43 CFR 3102.2-4 (1981) and 43 CFR 3102.2-6 (1981). Under 43 CFR 3102.2-4(a) an association, including a partnership, was required to file with its application, or have on file under a serial reference number assigned pursuant to 43 CFR 3102.2-1(c), the following:

- (1) A certified copy of its articles of association or partnership;

^{3/} On Feb. 26, 1982, the Department published interim final regulations which revised 43 CFR Subpart 3102 effectively eliminating the requirement to file the agent qualifications found in 43 CFR 3102.2-6. 47 FR 8544 (Feb. 26, 1982). In the absence of countervailing public policy reasons or intervening rights, this Board may apply an amended version of a regulation to a pending matter where it benefits the affected party to do so. See James E. Strong, 45 IBLA 386 (1980); Wilfred Plomis, 34 IBLA 222, 228 (1978); Henry Offe, 64 I.D. 52, 55-56 (1957). In this case, however, it is not possible to do so because of the intervening rights of the second- and third-priority applicants.

(2) A statement that it is authorized to hold oil and gas leases; and

(3) A complete list of all general partners or members together with a statement as to their citizenship and identifying those authorized to act on behalf of the association or partnership in matters relating to Federal oil and gas leasing.

In addition, 43 CFR 3102.2-4(b) required that not later than 15 days after the filing of the application, the following had to be filed or contained in the serial reference file:

(b) A separate statement from each person owning or controlling more than 10 percent of the association, setting forth citizenship and compliance with the acreage limitations of §§ 3101.1-5 and 3101.2-4 of this title, shall be filed with the proper Bureau of Land Management office not later than 15 days after the filing of the offer, or application in leasing is in accordance with Subpart 3112 of this title.

The pertinent Departmental regulations provided three alternative methods of complying with the requirement that an applicant notify BLM of any agreement or understanding with an agent. Arthur H. Kuether, 65 IBLA 184 (1982). Under 43 CFR 3102.2-6(a), an applicant was required to submit with his lease application

a personally signed statement as to any understanding, or a personally signed copy of any written agreement or contract under which any service related to Federal oil and gas leasing or leases is authorized to be performed on behalf of such applicant. Such agreement or understanding might include, but is not limited to: a power of attorney; a service agreement setting forth duties and obligations; or a brokerage agreement.

In the alternative, under 43 CFR 3102.2-6(b), an applicant could have submitted with his lease application a uniform agreement entered into between several applicants and an agent. The applicant also had, within 15 days thereafter, to see to it that a list of the names and addresses of all applicants participating under the agreement was filed in the state office. Finally, under 43 CFR 3102.2-1(c), an applicant could have placed evidence of agency qualifications on file and made reference in future simultaneous filings, by assigned serial number, to such evidence. William K. Monk, 68 IBLA 339 (1982).

In the present case, Hunter Court's filing service, Western, submitted documents to obtain a qualification number for Hunter Court. The documents included the partnership documents and a copy of a signed written agreement between Hunter Court and Western. This information was stamped in by BLM on December 29, 1981. A January 20, 1982, letter to Hunter Court formally notified the applicant that the effective date of Hunter Court's qualifications was December 29, 1981, and assigned number C-34846 to the qualification file.

Examination of the January 20, 1982, letter from BLM to Hunter Court reveals that it was a form letter intended to notify Hunter Court that its

submission complied with 43 CFR 3102.2-4. The letter stated that "your company" meets the requirements of the law and "is qualified" to acquire and hold interests in leases. It also informed Hunter Court that changes in the statement, such as name or title changes of partners or in authority to act, should be kept current. BLM made no reference to the filing service agreement between Hunter Court and Western.

Hunter Court's application cited reference number C-34846. We must determine the significance of the use of that number. It clearly was meant to satisfy 43 CFR 3102.2-4 by reference, which it did, since the regulation 43 CFR 3102.2-1(c) allowed a statement of the qualifications of a partnership to be placed on file and subsequently referenced. The question raised, however, is whether it also satisfied 43 CFR 3102.2-6.

[1] Appellant argues that Western was not an agent of Hunter Court and that the alternate disclosure method provided by 43 CFR 3102.2-1(c) was not available to comply with 43 CFR 3102.2-6. Appellant is wrong. Western was an "agent" of Hunter Court for purposes of 43 CFR 3102.2-6. ^{4/} Western was in the business of providing assistance to participants in the Federal oil and gas leasing program. Thus, compliance with 43 CFR 3102.2-6 by reference was not precluded in this case.

Appellant argues, however, that the regulations provide no authority whereby the qualifications file of an applicant may contain the information required of the agent. In order to address this contention, we must first explore whether there was compliance with 43 CFR 3102.2-6(a) or (b), such as to negate the necessity for consideration of whether there was compliance by reference.

Under 43 CFR 3102.2-6(a), set forth, supra, any "applicant" receiving assistance was required to submit "with the lease application" a personally signed statement of any understanding or written service agreement. No such statement or agreement accompanied the application. There was no compliance with 43 CFR 3102.2-6(a).

Hunter Court also failed to comply with 43 CFR 3102.2-6(b). In Arthur H. Kuether, supra at 188, we stated: "Pursuant to 43 CFR 3102.2-6(b), a copy of the uniform agreement must be submitted with the lease application; also a list of names and addresses of each applicant participating under the agreement must be submitted within 15 days of the filing of the application." (Emphasis in original.) In this case, as in Kuether, a uniform agreement was not submitted with the lease application. Therefore, Hunter Court did not comply with 43 CFR 3102.2-6(b). ^{5/}

^{4/} Appellant asserts that no agency relationship was created between Hunter Court and Western. He directs the Board to the "Filing and Administrative Service" agreement which provided, "This Agreement is not intended to create the relationship of agent or employee." Despite this disclaimer we note that the letter filed by Western with BLM on Jan. 25, 1982, states: "For the month of January 1982, Western New York Geological Services, Inc. will be filing as agent for the following offerors * * *." (Emphasis added.) Hunter Court was included on the list of "offerors."

^{5/} It appears from the record that Western attempted to satisfy this requirement. On Jan. 25, 1982, Western filed a letter with BLM which stated:

Thus, we return to appellant's contention that the regulations do not allow the applicant's qualification file to contain agent information. There is no merit to this contention. Although the regulation may not have expressly allowed it, neither was it expressly prohibited. The fact that BLM's assignment of a reference number to Hunter Court related to its partnership qualifications does not mean that the filing service agreement included in that file may be ignored.

[2] The question presented is whether that filing service agreement and the other material requested by BLM are sufficient to satisfy 43 CFR 3102.2-6. 6/ Appellant argues that they were not. Appellant contends, however, that Hunter Court failed to disclose fully its agreement with Western because the service agreement references materials describing services and procedures pursuant to Western's "Federal/State Land Lease Acquisition Program" which appellant asserts Hunter Court was required to submit under the rationale of Ricky L. Gifford, supra. That case involved a leasing service which incorporated by reference a specific brochure that described the leasing service's program. The Board found that the scope of the agreement could not be ascertained without the brochure, but since the necessity to submit a copy of the brochure may not have been readily apparent to appellant the Board allowed appellant 30 days to submit a copy of the brochure to the BLM State Office.

Here, following the rationale of Ricky L. Gifford, supra, BLM requested that Hunter Court submit the "other materials" referred to in the Hunter Court service agreement with Western. Hunter Court responded by submitting a copy of its Partnership Agreement, a copy of a letter from Western to Hunter Court dated January 25, 1982, stating that Western was filing "512 applications for you" for January 1982; a copy of the "Filing and Administrative

"Enclosed is a copy of the Western New York Geological Services, Inc., uniform agreement, as per regulation #3102.2-6 agents." Western also enclosed names and addresses of clients participating in the January 1982 filing. The January 1982 simultaneous filing period closed Jan. 22, 1982. See 43 CFR 3112.1-2. Assuming that any filing of a uniform agreement during the simultaneous filing period could be construed as a filing made with a previously filed application, the uniform agreement still was not timely filed in this case because it was filed on Jan. 25, 1982, after the close of the simultaneous filing period. See Robert R. Amdahl, 62 IBLA 246, 247 (1982). To the extent the BLM decision indicated that Western's filing complied with the regulation, it was in error.

6/ Although BLM dismissed appellant's protest, by letter of the same date it requested from Hunter Court the following:

"Since the filing service agreement which covered your application on this parcel indicates in Item 3 that you received other materials describing Western New York Geological Services' Federal/State Land Lease Acquisition Program, we are requesting that you submit a certified copy of any of this information in order that we may determine that the filing service did not hold an interest in your application."

BLM gave Hunter Court 30 days from receipt of the letter to file the further information. BLM stated that if Hunter Court failed to submit the information "within the time allowed, your application will be rejected."

Service Agreement"; and a June 1981 Western "Newsletter" which notes at the bottom of the first page, "Federal Oil and Gas Land Acquisition Program."

Appellant contends that Western routinely provided to clients, such as Hunter Court, significant additional information which has not been disclosed. Appellant attached to his statement of reasons as exhibit D documents which he asserts establish that Hunter Court is in noncompliance with 43 CFR 3102.2-6. Document 1 is a June 8, 1982, letter that appears to be a form solicitation to entice investors to participate in Western's investment program for 1982. Hunter Court entered its agreement with Western effective November 15, 1981, so that document 1 would not be applicable. Document 2 is a blank copy of the "Filing and Administrative Service Agreement" which was timely filed by Hunter Court. Document 3, entitled "Highlights 'Leveraged Oil & Gas Land Lease Program'" describes a Western program for which the closing date of November 1, 1981, makes it inapplicable to Hunter Court's November 15, 1981, agreement. ^{7/}

Document 4, entitled "Newsletter," dated May 1982, presents statistics for the leases that were evaluated from the January filing (including parcel WY-404, the parcel involved in this case) and priority notices for the March 1982 filing period. The "Newsletter" is dated after the agreement was issued and though it is applicable to the time frame during which the agreement is in effect, it does not provide any information helpful or necessary to BLM and indeed would not be encompassed by the Hunter Court agreement with Western which refers to materials the client "has received" and "reviewed" at the time of the signing of the agreement on November 16, 1981. In addition, it is merely a copy of the same type of "Newsletter" submitted by Hunter Court in response to BLM's request.

Document 5 is a blank copy of an "Investment Advisory Agreement" and document 6 is a blank copy of a "Recourse Promissory Note." The "Investment Advisory Agreement" provides that the client will receive the following "investment advisory services":

2(g) Western New York Geological Services, Inc. as a dealer in the purchase and sale of oil and gas leases, will:

- 1.) appraise leases to determine their fair market value
- 2.) market leases and negotiate lease contracts with oil companies, dealers, and independent drillers

^{7/} Appellant asserts that because the Hunter Court partnership agreement was signed on Nov. 1, 1981, that Hunter Court's agreement with Western was encompassed by document 3. Even if that were the case, our review of document 3 reveals that the program provides that Western's clients are not obligated to sell to Western, but may offer the lease to the highest bidder. The purpose of the regulation requiring copies of the filing service agreement was to provide information regarding the nature of the relationship of the filing service with its clients so that BLM could determine that the filing service had no interest in its clients' leases. Document 3 does not reflect that Western has an interest in its clients' leases.

* * * * *

2(h) Western New York Geological Services will seek out from among prospective buyers a qualified buyer for parcels and negotiate on behalf of the client the sale price of such lands, and the royalty agreement on the future production income of any and all wells drilled on these parcels. Legal fees and costs associated with the negotiations will be paid by Western New York Geological Services, Inc.

The agreement states that Western shall be paid a "fee of ___" for the services rendered.

Appellant argues that this agreement fails to disclose the nature of the fee, whether it is a flat fee, one based on the sale price of the lease, or an interest in the lease itself. 8/ Appellant also argues that pursuant to the "Recourse Promissory Note" the "majority (over 70%) of the funds necessary for filing applications are advanced to the applicant by Western in return for an undisclosed consideration" (Statement of Reasons at 9).

A copy of Hunter Court's "Filing and Administrative Service Agreement" was contained in the qualifications file. In response to BLM's request, Hunter Court filed a June 1981 "Newsletter" and a copy of the January 25, 1982, letter from Western. The other information submitted was already part of the record.

Appellant alleges that the documents it has provided establish that additional agreements existed between Hunter Court and Western. However, none of the additional documents submitted by appellant is specifically linked to the Hunter Court-Western relationship. On the other hand, appellant is at a distinct disadvantage in attempting to establish whether such materials existed between Hunter Court and Western. Hunter Court and Western are in the best position to define their relationship, yet Hunter Court has provided only the above-cited documents. Although not called upon to do so, Western has not volunteered to clarify its agreement with Hunter Court. Likewise, we note that a copy of the statement of reasons in this case was served on Hunter Court by appellant, and Hunter Court has not availed itself of the opportunity to deny or comment on any of the allegations made by appellant. However, in the circumstances of this case we believe that Hunter Court should be given the opportunity to present evidence at a hearing to clarify its relationship with Western.

8/ The "Investment Advisory Agreement" of Western could have violated 43 CFR 3112.6-1(c)(1) (1981) which provided in pertinent part: "Any agreement * * * which obligates the applicant to use the services of the third party when assigning or transferring any interest in the lease, if issued; is prohibited is [sic] such an agreement * * * exists between the third party and 2 or more applicants for the same parcel * * *." Thus, if Western entered into such an agreement with more than one client and filed those applicants for the same parcel, the regulation would have been violated.

[3] it is a well accepted evidentiary principle that a litigant does not have the burden of establishing facts peculiarly within the knowledge of an adversary. Campbell v. United States, 365 U.S. 85, 96 (1961); Browzin v. Catholic University of America, 527 F.2d 843, 849 (D.C. Cir. 1975). Likewise, the burden of proving a fact is on the party who presumably has peculiar means of knowledge enabling him to prove its falsity, if it is false. Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 36 (7th Cir. 1975). In this case, appellant has presented evidence that Western had certain standard form agreements for execution by its clients. Whether or not Hunter Court had entered into any such agreements with Western is a fact which is peculiarly within the knowledge of Hunter Court and Western. Thus, the burden of proving that no other agreements or arrangements existed is on Hunter Court.

Appellant has raised considerable doubt whether Hunter Court provided all relevant materials. Thus, at the hearing if Hunter Court fails or refuses to clarify that doubt, the adverse inference rule may be applied. That rule provides that when a party has relevant evidence within its control which it fails to produce, when it would be expected to do so under the circumstances, such failure may give rise to an inference that the evidence is unfavorable. International Union (U.A.W.) v. N.L.R.B., 459 F.2d 1329, 1335-38 (D.C. Cir. 1972). ^{9/}

[4] Appellant also argues that there was no limitation on the authority of Western to act on behalf of Hunter Court. Appellant points out that 43 CFR 3102.2-1(c) requires that agent qualifications may be placed in a reference file "if the duration of the authority to act is less than 2 years and is specifically set out."

The service agreement in the qualifications file in this case stated, "The term of this agreement shall be for a minimum of one (1) year commencing on -- November 15, 1981, and ending December 15, 1982." Also, the agreement stated that it was subject to termination "only by the written consent of both parties."

An agency agreement which was filed for reference pursuant to 43 CFR 3102.2-1(c) (1981), had to be limited in duration to less than 2 years. Westates Group No. 8, 69 IBLA 186, 191 (1982). The wording of the agreement in this case is ambiguous concerning its duration. At the hearing Hunter Court will have the burden of establishing that its agreement was for less than 2 years.

The Administrative Law Judge to whom the case is assigned shall render an initial decision which shall be final for the Department, absent an appeal to this Board.

^{9/} We realize that in this case we are requiring the proof of a negative, i.e., that no other agreements or arrangements existed. However, Hunter Court may be able to establish by testimony, under oath, that no other agreements or arrangements exist.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is referred to the Hearings Division.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Edward W. Stuebing
Administrative Judge

